TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~494~~ 262

BENJAMIN BAGNALL, PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED OCTOBER 17, 1870.

15

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1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the justices of the supreme court of the State of Wisconsin, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of *of* Wisconsin before you between Benjamin Bagnall, plaintiff, and the State of Wisconsin, defendant, a manifest error hath happened, to the great damage of the said Benjamin Bagnall, as by the complaint appears; and, it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, tc correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this ninth day of April, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fourth.

EDWARD KURTZ,
Clerk U. S. Circuit for Dist. of Wisconsin.

Allowed by me.

LUTHER S. DIXON,
Chief Justice Sup. Ct. Wis.

2 The return to the within writ appears by the schedule thereto annexed. The return of the justices of the supreme court of the State of Wisconsin.

[SEAL.] Attest: LA FAYETTE KELLOGG,
Clerk Sup. C. Wis.

(Indorsed:) Benjamin Bagnall vs. The State of Wisconsin. Writ of error. Filed Apr. 16, 1870. L. F. Kellogg, clerk sup. ct. Wis.

3 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in the city of Madison, the seat of government of said State, on the Tuesday next preceding the second Wednesday in January, in the year of our Lord one thousand eight hundred and seventy.

Present, the Hon. Luther S. Dixon, chief justice; the Hon. Orsamus Cole, and the Hon. Byron Paine, associate justices.

LA FAYETTE KELLOGG, *Clerk.*

Be it remembered that heretofore, to wit, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and sixty-nine, came into the office of the clerk of said supreme court Benjamin Bagnall, by Messrs. Gregory and Pinney, his attorneys, and filed his certain complaint and notice to plead, answer, or demur thereto; which said complaint and notice are in the words and figures following, that is to say:

4 State of Wisconsin supreme court.

BENJAMIN BAGNALL, PLAINTIFF,
ag't
THE STATE OF WISCONSIN, DEFENDANT.

To the attorney general of said State, Hon. Cha's R. Gill.

SIR: You are hereby notified that, on the 22d day of January, A. D. 1869, a complaint in the above-entitled action, with a copy of which you are herewith served, was filed in the office of the clerk of the supreme court of said State, at Madison, Wisconsin, and you are hereby notified to answer or demur thereto on or before the 22d day of February, A. D. 1869.

Dated January 22d, A. D. 1869.

Yours, respectfully,

GREGORY & PINNEY,
Att'ys for Pl'ff.

5 State of Wisconsin supreme court.

BENJAMIN BAGNALL, PLAINTIFF,
ag't
THE STATE OF WISCONSIN, DEFENDANT.

The above-named Benjamin Bagnall, the plaintiff in this action, complains against the above-named defendant, The State of Wisconsin, pursuant to the statute in such case made and provided, and respectfully shows to this court, first, that on the 1st day of May, A. D. 1865, at the city of Milwaukee, in said State, the First National Bank of Milwaukee, in said State, was a banking corporation, duly organized and existing under and in pursuance of the several acts of Congress then in force concerning national banking, and known as the national banking acts, with a capital stock of two hundred thousand dollars; all of which then was, and has ever since then continued to be, and now is, invested in bonds and securities issued by the United States, and known and called United States bonds; and that the capital stock of said banking corporation then was and still is divided into two thousand shares of one hundred dollars each; and that the said plaintiff then was, and has been ever since then, and now is, the owner of one share of the capital stock of said corporation; that one E. H. Brodhead then was and still is president of said corporation, and that H.
6 H. Camp then was and still is cashier thereof; and that said corporation then was, and ever since then has been, located and doing business at the city of Milwaukee aforesaid, in the Seventh ward thereof, under and by virtue of the authority aforesaid, at which place the said plaintiff then resided and still resides.

And the said plaintiff further shows that no return was ever made and filed in the office of the treasurer of said State, under and in accordance with sections one and two, of chapter four hundred of the laws of said State for the year 1865, showing that said plaintiff or any one else was the owner of any share or shares in said banking corporation; but the said defendant has heretofore claimed that a tax of one dollar and fifty cents to be due and owing from him to it, on account of his said share, under the provisions of said chapter four hundred, but which claim this plaintiff insists is without foundation.

And the said plaintiff further shows that afterwards, and in the

month of June, A. D. 1868, the assessor of the said Seventh ward, in the city of Milwaukee, under and by virtue of the provisions of chapter one hundred and thirty-six of the laws of said State for the year 1868, proceeded to assess said share in said banking corporation belonging to this plaintiff, according to the provisions of said act,
7 at the sum of one hundred dollars; and thereupon afterwards the clerk of said city of Milwaukee, pursuant to said act, did set down on the assessment roll of said city, opposite the name of this plaintiff as owner of such share, a tax thereon of one and one-half per centum of such assessment for the year 1865, amounting to one dollar and fifty cents, and the said assessment and tax list was afterwards, and on or about the 10th day of December, A. D. 1868, delivered to the city treasurer of said city, to the end that he might collect the said tax.

And the said plaintiff further shows that afterwards, and on or about the 16th day of January, A. D. 1869, he did, under and by virtue of the privileges and rights granted by section fourteen of said chapter one hundred and thirty-six of the laws of said State for the year 1868, pay to the treasurer of said State the said sum of one dollar and fifty cents so claimed to be assessed and due as and for a tax on his said share in said banking corporation for the year 1865, and which said sum was then received by said treasurer as aforesaid.

And the said plaintiff further shows that said assessment so made of said share by the said assessor was not equalized, as were the assessments of all other property in said State for said year 1865; nor was the assessed value of said share ever included in the basis for apportionment of taxes for that year, nor was the amount of such
8 alleged tax fixed, or the assessment of said share determined as the taxes on property, other than shares in national banks for said year 1865 were fixed and determined; that the rate per centum of said tax so imposed on said share for said year exceeded the rate per cent. charged and assessed for State tax under the laws of said State for that year on property other than shares in national banks in said State at least one per cent., whereby the amount of said tax was made at least three times as great as it would have been had the same been assessed at the same rate per cent. that was assessed for said year for State tax on property other than shares in national banks.

And the said plaintiff further alleges that said tax was assessed and charged against share of said plaintiff in said bank without any authority of law; that by law the same was not taxable for or during said year 1865; and that the said acts of the legislature of the State of Wisconsin, so far as they provided for assessing the aforesaid tax, were and are wholly void and of no effect, and were and are in contravention of the 8th section of the first article of the Constitution of the United States, and in contravention of the act of Congress approved Feb'y 25th, 1862, entitled "An act to authorize the issue of United States notes, and for the redemption and funding thereof, and for funding the floating debt of the United States;" and of the act of
9 Congress entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved Feb'y 25th, 1863; and of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, A. D. 1864; and for the reason that said assessment and taxation was not made in conformity with the said acts of Congress and the constitution and laws of the State of Wisconsin. By means whereof, and by force of the statute afore-

said, the said defendant became, and was, and still is, indebted to the said plaintiff in the said sum of one dollar and fifty cents, with interest thereon at the rate of six per cent. per annum from the 16th day of January, A. D. 1869.

And for a further and separate cause of action, that, on the first day of May, A. D. 1865, at the city of Milwaukee, in said State, the First National Bank of Milwaukee, in said State, was a banking corporation duly organized and existing under and in pursuance of the several acts of Congress then in force concerning national banking, and known as the national banking acts, with a capital stock of two hundred thousand dollars, all of which then was, and ever since then continued to be, and now is, invested in bonds and securities issued by the United
10 States, and known and called United States bonds; and that the capital stock of said banking corporation then was, and still is, divided into two thousand shares of one hundred dollars each; and that the said plaintiff then was, and has been ever since, and now is, the owner of one share of the capital stock of said corporation; that one E. H. Brodhead then was, and still is, president of said corporation; and that H. H. Camp then was, and still is, cashier thereof; and that said corporation then was, and ever since then has been, located and doing business at the city of Milwaukee aforesaid, in the 7th ward thereof, under and by virtue of the authority aforesaid, at which place the said plaintiff then resided, and still resides.

And the said plaintiff further shows that no return was ever made and filed in the office of the treasurer of said State, under and in accordance with sections one and two of chapter four hundred of the laws of said State for the year 1865, showing that the said plaintiff, or any one else, was the owner of any share or shares in said banking corporation; but the said defendant has heretofore claimed that a tax of one dollar and fifty cents to be due and owing from him to it, on account of his said share, under the provisions of said chapter four hundred, but which claim, this plaintiff alleges, is without any foundation.

11 And the said plaintiff further shows that afterwards, and in the month of June, A. D, 1868, the assessor of the said Seventh ward, in the city of Milwaukee, under and by virtue of the provisions of chapter one hundred and thirty-six of the laws of said State for the year 1868, proceeded to assess said share in said banking corporation belonging to this plaintiff, according to the provisions of said act, at the sum of one hundred dollars; and thereupon afterwards the clerk of said city of Milwaukee, pursuant to said act, did set down on the assessment roll of said city, opposite to the name of said plaintiff, as owner of such share, a tax thereon of one and one-half per centum of such assessment for the year 1866, amounting to one dollar and fifty cents; and the said assessment and tax list was afterwards, and on or about the 10th day of December, A. D. 1868, delivered to the city treasurer of said city, to the end that he might collect said tax.

And the said plaintiff further shows that afterwards, and on or about the 16th day of January, A. D. 1869, he did, under and by virtue of the privilege and rights granted by section fourteen of said chapter one hundred and thirty-six of the laws of said State for the year 1866, pay to the treasurer of said State the said sum of one dollar and fifty cents, so claimed to be assessed and due as and for a tax on his said share in said banking corporation for the year 1866, and which
12 said sum was then received by said treasurer as aforesaid.

And the said plaintiff further shows that said assessment so made of said share by the said assessor was not equalized, as were

the assessments of all other in said State for said year 1866, nor was the assessed value of said share included in the basis for apportionment of taxes for that year, nor was the amount of such alleged tax fixed, or the assessment of said share determined, as were the assessments and taxes, on property other than shares in national banks for said year 1866, *were* fixed and determined; that the rate per centum of said tax so imposed on said share for said year exceeded the rate per cent. charged and assessed for State tax under the laws of said State for that year, on property other than shares in national banks in said State, at least one per cent., whereby the amount of said tax was made at least three times as great as it would have been had the same been assessed at the same rate per cent. that was assessed for said year for State tax for property other than shares in national banks.

And the said plaintiff further alleges that said tax was assessed and charged against said share of said plaintiff in said bank without any authority of law; that by law the same was not taxable for or during the said year 1866, and that the acts of the legislature aforesaid,
13 so far as they provided for assessing the aforesaid tax, were and are in contravention of the 8th section of the first article of the Constitution of the United States, and in contravention of the act of Congress approved Feb'y 25th, 1862, entitled "An act to authorize the issue of United States notes, and for the redemption and funding thereof, and for funding the floating debt of the United States," and of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved Feb'y 25th, 1863, and of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, and for the reason that said assessment and taxation was not in conformity with the said acts of Congress and the constitution and laws of the State of Wisconsin. By means whereof, and by force of the statute aforesaid, the said defendant became, and was, and still is, indebted to the said plaintiff in the sum of one dollar and fifty cents, with interest thereon at the rate of six per cent. per annum from the 16th day of January, A. D. 1869.

Wherefore the said plaintiff demands judgment against the said defendant for the sum of three dollars, with interest thereon from
14 the 16th day of January, A. D. 1869, at six per cent. per annum, besides the costs of this action.

GREGORY & PINNEY,
Plaintiff's Attorneys.

15 And afterwards, to wit, on the fifth day of February, A. D. 1869, the same being the February term of said court, came John C. Spooner, esq., assistant attorney general of the State of Wisconsin, and filed its demurrer to the said complaint in the words and figures following, that is to say:

In supreme court State of Wisconsin.

BENJAMIN BAGNALL, PLAINTIFF,
vs.
THE STATE OF WISCONSIN, DEFENDANT.

The said defendant demurs to the first count or statement of cause of

action in the complaint herein, and says that the same does not state facts sufficient to constitute a cause of action.

And the defendant demurs to the second court or statement of cause of action in the said complaint, and says that the same does not state facts sufficient to constitute a cause of action.

JOHN C. SPOONER,
Ass't Att'y General, for Defendant.

(Endorsed:) Rec'd copy of within this 5th Feb'y, 1869.
GREGORY AND PINNEY,
Pl'ff's Att'ys.

16 And afterwards, to wit, at the February term aforesaid, on the twenty-ninth day of the term, the same being the second day of March, A. D. 1869, the following proceedings were had in said cause, that is to say:

BENJAMIN BAGNALL, PLAINTIFF,
vs.
THE STATE OF WISCONSIN, DEFENDANT. } Complaint, &c.

And now at this day came the parties herein by their attorneys, and the argument of this cause having been commenced by Messrs. Gregory & Pinney for the said plaintiff, and Messrs. Spooner & Lamb for the said defendant, and there not being now sufficient time to complete the same, it is continued for further argument.

And afterwards, to wit, on the thirtieth day of the term aforesaid, the same being the third day of March, A. D. 1869, the following further proceedings were had in said cause, that is to say:

BENJAMIN BAGNALL, PLAINTIFF,
vs.
THE STATE OF WISCONSIN, DEFENDANT. } Complaint, &c.

17 And now at this day came the parties herein by their attorneys, and the argument of this cause having been resumed and completed, and the court, not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards, to wit, at the June term of said court, on the thirty-ninth day of the term, the same being the seventh day of December, A. D. 1869, the following further proceedings were had in said cause, that is to say:

BENJAMIN BAGNALL, PLAINTIFF,
vs.
THE STATE OF WISCONSIN, DEFENDANT. } Complaint, &c.

Opinion: COLE, J.

This cause came on to be heard on the demurrer of the said defendant to the complaint of the said plaintiff, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court that the said demurrer be, and the same is hereby, sustained.

18 And thereupon the opinion of the court was filed by the Hon. Orsamus Cole, associate justice of said supreme court; which said opinion is in the words and figures following, that is to say:

19 BENJAMIN BAGNALL, PLAINTIFF,
v.
THE STATE OF WISCONSIN, DEFENDANT.

It appeared quite clear to me on the argument that all the important questions raised by the demurrer to the complaint in this case, which were so fully and ably argued by the counsel for the plaintiff, had already been decided adverse to his views in the case of Van Slyke v. The State of Wisconsin, and that unless we were prepared to change that decision the demurrer must be sustained. So, in fact, the counsel himself seemed to regard the effect of that decision, and hence he combated the main proposition in that case with all the vigor of his reasoning; and he contended that this court in that decision had wholly misconceived the true intent and meaning of the 41st section of the national banking law, which permits taxation by State authority of the shares of national banks, and had also misapprehended the decisions of the Supreme Court of the United States giving a construction to that section. He therefore invited the court to a re-examination of the grounds upon which the Van Slyke case was decided, being convinced, as he said, that a careful review of the whole subject would satisfy us that the decision made in that case ought not to stand. I have accordingly re-examined the questions involved in that case with all the care and reflection I have been able to bestow upon them, and, while
20 candor compels me to admit that I am not entirely free from doubt as to how they should be decided, yet I am inclined to the opinion that the conclusions there reached are correct, for the reasons stated by the chief justice in his opinion. I am aware that some of the State courts have taken a different view of the effect of the decisions of the Supreme Court of the United States upon this subject from that held by this court in the Van Slyke case. They seem to suppose that the Supreme Court has really decided that where the State law does not provide for the taxation of the shares, eo nomine, of the State banks, there can be no taxation of the shares of the national banks, although by the method of taxation resorted to by the State, the tax against the shares in the national banks does not exceed that imposed in some form upon the State banks or their stockholders. But I do not so understand those decisions. And it seems to me a little singular that if the Supreme Court intended to decide that Congress had provided a certain definite mode for taxing the shares in the national banks, and that the States could only tax those shares where by its laws the shares, eo nomine, in the State banks were also taxed, that it did not say this in so many words, without resorting to any course of reasoning to show that a tax upon the capital of the State banks was not an equivalent to a tax on the shares, inasmuch as the capital of the State banks might consist of the bonds of the United States, which are exempt from State taxation. For it would be sufficient to say, if this was really the view
21 of that court, that as the State law does not provide for taxing the shares in the State banks, there can be no taxation of the shares of the national banks. This would be the most natural way of disposing of the question. In the cases which came before that court where the tax was imposed on the capital of the State banks, those banks were entitled to a deduction of that portion of their capital in-

vested in United States securities. Hence it was easy to see that this tax on the capital was not an equivelant for a tax on the shares of the stockholders, as the Supreme Court say in more than one of the cases. But in this State every State bank, in consideration of the franchises or privileges granted by the banking law, is required to pay the State treasurer a semi-annual tax of three-fourths of one per centum on the amount of the capital stock of the bank, regardless of the fact whether its capital is invested in United States secureties or whether a portion of its capital has been lost in business. This tax is paid on the "capital stock" by these corporations as a compensation for the special privileges granted them by the State, and as a fair equivelant for the exemption from local taxation on their property. (State Bank v. The City of Milwaukee, 18 Wis., 281.) And this constitutes the fundamental distinction between a case arising under our State banking law and one arising where the tax is upon the capital stock of the State bank, and the bank is entitled to a deduction from its capital stock of the amount invested in United States securities; for, wherever a tax of a given percentage is imposed upon the capital stock of a State bank, and that capital is liable to be diminished on account of a portion or all of it being invested in United States securities, and the same rate
22 imposed upon the shares of national banks, there it is plain the taxation is not equal or equivalent. The latter species of property is subjected to a greater rate of taxation than the former; and it was doubtless to prevent this unwise, unjust, and improper discrimination against the national banks that the provisos in the 41st section were enacted by Congress. But where the law is such that the rate imposed on the shares in the national banks can in no possible event exceed the rate imposed on the State banks, the object of the second proviso is certainly fulfilled.

In this State the taxation of the rate of one and one-half per cent. upon the shares in the national banks in no contingency exceeds, while it doubtless in many cases falls short, of the taxation upon the State banks. What injustice, then, is done the owners of shares in the national banks if the tax on the State banks is imposed upon the capital stock instead of being imposed upon the shares of those banks? The variance in the mode of taxation is of no practical importance, since, in either case, the tax is substantially the same, and must always be equal to, if it does not exceed, the taxation imposed previous to 1867 upon the shares in the national banks. But this whole field of discussion is so fully gone over by the chief justice in his opinion in the Van Slyke case, that further remark upon these points would seem quite unnecessary.

It is objected that by the laws of this State the owner of shares in national banks was not required to include them in the valuation
23 of his personal property. A bare reference to chap. 400, Laws 1865, and chap. 136, Laws 1868, will show that this is a mistake. It is said, however, that these statutes fix an arbitrary value for all shares. The law of 1868 makes it the duty of the assessor to inquire into and ascertain the true cash value of the shares at the time fixed by law for the assessment of personal property for taxation for the year 1865 and 1866, and also provides that in no case shall such shares be assessed at more than their par value. We do not understand that it is claimed that the plaintiff's share was assessed too high or was not worth par. Moreover, if there was an over-valuation, the plaintiff might have had it reduced. The law requires that the same rate of tax which was assessed and levied in 1865 and 1866 upon other monied capital in the hands of individual citizens of the State in the city or place where

the bank is located should be assessed upon these shares, but that in no case should the rate exceed one and one-half per cent. upon the assessed value of the shares. This was conforming the legislation strictly to the limitations in the act of Congress, unless that act requires the tax to be in all cases upon the shares of the State banks. I have already assumed that it was not the intention of Congress, in framing the second proviso, to prescribe a mode of taxing the State banks, but to prevent unjust discrimination against the national banks; and, this being so, the law of 1868 is in harmony with the 41st section. It is alleged in the complaint that the rate imposed on the plaintiff's share for the year 1865 and 1866 exceeded the rate per cent. charged and assessed for "State tax" on other monied capital in the hands of individual citizens
24 of Milwaukee for those years. This allegation may be true, and yet the plaintiff's share may not have been taxed as high as other property, which paid not only a State tax but also local and municipal taxes. The question is, Was one and a half per cent. upon the plaintiff's share a greater rate of taxation than was assessed upon other monied capital in Milwaukee of equal value for all purposes? This is not pretended. It was doubtless much less than was, in fact, imposed upon other property, since the local and municipal taxes constitute by far the greatest burthens of taxation.

The authority of the legislature to pass a law providing for a reassessment of a tax for a given year, where there has been a defect in the existing statute or in the tax proceedings, has been frequently affirmed by this court. No further remarks upon that point are deemed necessary.

It follows from these views that the demurrer to the complaint must be sustained.

25 And afterwards, to wit, at the January term of said court, on the forty-seventh day of the term, to wit, on the second day of April, A. D. 1870, the following further proceedings were had in this cause, that is to say:

BENJAMIN BAGNALL
vs.
THE STATE OF WISCONSIN.

This cause came on to be heard on the demurrer of the said defendant to the complaint of the said plaintiff, and was argued by Mr. Pinney, of counsel for the plaintiff, and the attorney general and Mr. Spooner, of counsel for the defendant; and the said plaintiff, having claimed exemption from the taxation mentioned in said complaint, under and by virtue of the eighth section of the first article of the Constitution of the United States, and under and by virtue of the act of Congress, approved the 25th of February, A. D. 1862, entitled "An act to authorize the issue of United States notes, and for the redemption and funding thereof, and for funding the floating debt of the United States," and under and by virtue of the act of Congress entitled "An act to provide for a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25th, 1863, and under and by virtue of the act
26 of Congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, A. D. 1864, and particularly under the 41st section of the last-named act, upon the ground that the whole capital stock of the First National Bank of Mil-

waukee, in said complaint mentioned, is invested in bonds of the United States, and on the ground that said assessment and taxation in said complaint complained of was not made in conformity with the said acts of Congress or with the Constitution and laws of the State of Wisconsin, and particularly that the same was not in conformity with the 41st section of the aforesaid act of Congress, approved June 3d, 1864, in that, by the laws of Wisconsin shares in the State banks were not taxable in the years 1865 and 1866 at all, and in that such share in said national bank was not included in the valuation of the personal property of the said plaintiff in the assessment of taxes imposed by and under State authority, and the validity of the authority claimed to assess and impose the taxes in said complaint mentioned, under the statute of said State, entitled "An act to provide for taxing the shares of stock of national banking associations," approved April 8th, A. D. 1865, and to reassess and collect the same under the statute of said State, entitled "An act to provide for the reassessment and collection of delinquent
27 taxes of 1865 and 1866 on the shares of national banks in this State," approved March 6th, 1868, on the ground of repugnance to the aforesaid provisions of the Constitution of the United States and the aforesaid acts of Congress, and the construction of the aforesaid acts of Congress, being drawn in question in this cause, in respect to the matters aforesaid. Upon consideration whereof, it is by the court now here considered and adjudged that the taxation mentioned and complained of in said complaint was lawfully imposed, and that the State of Wisconsin had authority lawfully to impose and to reassess and collect the same under the aforesaid statutes of Wisconsin; and that the exemption thus set up and claimed is not well founded in law; and that, therefore, the complaint in this action is insufficient in law.

Wherefore it is considered and adjudged that said plaintiff take nothing by his suit; and that the said defendant go thereof without day; and that it recover against the said plaintiff its proper costs and charges in and about its defense herein expended, to be taxed; and that the defendant have execution therefor.

28 Supreme Court of the United States.

BENJAMIN BAGNALL
vs.
THE STATE OF WISCONSIN.

Know all men by these presents that we, Benjamin Bagnall and Theophelus L. Baker and Hoel H. Camp, all of the city of Milwaukee, in the State of Wisconsin, are held and firmly bound unto the State of Wisconsin in the sum of three hundred dollars, to be paid to the said State of Wisconsin, its successors or assigns; to which payment, well and truly to be made, we bind our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated the 12th day of April, A. D. 1870.

Whereas the above-named Benjamin Bagnall hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of Wisconsin:

Now, therefore, the condition of this obligation is such, that if the above-named Benjamin Bagnall shall prosecute his said writ of error to effect, and answer all costs if he fail to make good his plea, then this

obligation shall be void; otherwise the same shall be and remain in full force and virtue.

29 BENJAMIN BAGNALL. [SEAL.]
THEOPHELUS L. BAKER. [SEAL.]
HOEL H. CAMP. [SEAL.]

Sealed and delivered in the presence of—
F. G. BIGLOW.
H. C. FIEDLER.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Theophilus L. Baker and Hoel H. Camp, both of said county, each being duly sworn, says for himself that he is worth the sum of one thousand dollars over and above all debts by him owing, and all exemptions by law, in property situate in said county liable to execution; & further saith not.

THEOPHILUS L. BAKER.
HOEL H. CAMP.

Subscribed & sworn to before me April 13th, A. D. 1870.
F. G. BIGLOW,
Not'y Public Mil. Co., Wis.

I hereby approve of the within bond and sureties.
April 16th, 1870.
L. S. DIXON,
Chief Justice Sup. Ct. Wis.

30 UNITED STATES OF AMERICA:

To the State of Wisconsin:

Whereas Benjamin Bagnall, plaintiff, lately issued out of the Supreme Court of the United States a writ of error, directed to the justices of the supreme court of the State of Wisconsin, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the supreme court of the State of Wisconsin before the justices thereof between said plaintiff and you, manifest error hath happened, to the great damage of the said plaintiff, Benjamin Bagnall:

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the Supreme Court of the United States, at the city of Washington on the first Monday of December next:

You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Madison, Wisconsin, the 16th day of April, A. D. 1870.

L. S. DIXON,
Chief Justice Sup. Ct. Wis.

(Indorsed:) Supreme Court U. S. Benjamin Bagnall, pl'ff in error, vs. The State of Wisconsin, def't in error. Citation.

Served on me this 19th day of Ap'l, 1870.

S. S. BARLOW,
Att'y Gen. Wisconsin.
THAD. C. POUND,
Acting Governor.

Filed Apr. 20, 1870.

L. F. KELLOGG,
Clerk Sup. Ct. Wis.

31 STATE OF WISCONSIN, *Supreme Court:*

I, La Fayette Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom, and also a true copy of the bond for costs and the original citation.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, the 10th day of October, A. D. 1870.

[SEAL.]

LA FAYETTE KELLOGG,
Clerk of Supreme Court of Wisconsin.

(Indorsed:) State of Wisconsin supreme court. Benjamin Bagnall, plaintiff in error, against The State of Wisconsin, defendant in error. Certified copy of record and proceedings. Fee for this copy, $9 25.

(Indorsement on cover:) No. 494. Benjamin Bagnall, plaintiff in error, vs. The State of Wisconsin. Wisconsin sup. court.
Filed 17th October, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 261.—December Term, A. D. 1870.

NAPOLEON B. VAN SLYKE,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

ABSTRACT AND BRIEF.

S. U. PINNEY,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 261.—December Term, A. D. 1870.

NAPOLEON B. VAN SLYKE,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

Action brought against the State of Wisconsin in the manner provided by its constitution and laws, to recover the sum of $750 and interest, paid by the shareholders of The First National Bank, of Madison, to the State Treasurer, as alleged taxes imposed on such shares under the provisions of chapter 400 Session Laws of Wisconsin, 1865; which sum was paid under protest against the validity of such taxes and in order to prevent a threatened sale of the shares of stock to satisfy the same.

The capital stock of such bank was all invested in stocks, bonds and securities of the United States. (Record, Fol. 4.)

The plaintiff in error obtained from each of the other shareholders, an assignment of his claim to the money thus paid and as the real party in interest, brings this action for its recovery in his own name, according to the practice established under the code in force in Wisconsin; and it is claimed that the tax was not assessed and charged in conformity with the 41st section of the National Banking Act of June 3, 1864, and that chapter 400, Laws of Wisconsin for 1865, is void and inoperative by reason of its conflict and want of conformity with said 41st section.

These questions were presented by demurrer to the complaint, which was sustained by the Supreme Court of Wisconsin, (but two

Justices sitting, the third having been prior to his appointment, of counsel in the matter here involved), and the case comes to this court under the 25th section of Judiciary Act, by writ of error to Supreme Court of Wisconsin, upon the judgment rendered by that court in favor of the defendant upon such demurrer.

The complaint, the judgment upon the demurrer (Record, Fol. 28), and the opinion of the court (Record, Fol. 17), show what questions were involved, and that they are such as are reviewable upon this writ; —and the sustaining of the demurrer and rendering judgment thereon for the defendant is assigned as error.

The provisions of the constitution and laws of Wisconsin, necessary to a proper understanding of the case, are as follows: By Sec. 5, Art. XI, Const. Wis., the legislature were authorized to submit the question of "bank or no bank" to the voters at a general election, and if they voted in favor of banks, then the legislature were empowered to pass a general banking law, but no such law should have any force or effect until submitted to a vote of the electors of the state at some general election, and approved by a majority of the votes cast at such election, and by sec. 4 of said article it was declared that the legislature should not "have power to create, authorize or incorporate by general or special law any bank or banking power or privilege or except as provided in said article."

Pursuant to these provisions the general banking law of 1852 was enacted and approved, under which our state banks were organized—Chapter 479, Laws of Wisconsin for 1852. By the 16th section of this act it was provided that "*every bank and banking association* organized under the provisions of this act, shall pay to the State Treasurer, on the first day of January and July of each year a semi-annual tax of three-fourths of one per centum *on the amount of capital stock* of each bank or banking association; the first payment of such tax to be computed at the rate of one-and-a-half per cent. per annum from the time of filing the certificate of incorporation to the first day of January or July then next succeeding. * * * Said capital stock *shall be exempt from all other taxes*, except on that portion of said capital stock which shall consist of and include the real property of such bank or banking association; and the real property of all banks and banking associations shall be assessed and taxed in the city, ward, village or

town where the same is located, for all state, county, town and corporation purposes, in the name of such bank or banking association; *provided*, that the *owner or holder of shares of stock in any bank or banking association shall not be taxed as an individual for such shares of stock.*" This section also provides that if any bank neglects or refuses to pay such tax for thirty days, it shall forfeit and pay to the State Treasurer one per centum on the amount of its capital stock; that the tax shall be a lien on the interest of the securities of the bank in the hands of the State Treasurer; that he may collect and apply such interest to the payment of the tax and forfeiture and if any balance remains unpaid, he may collect it by action of debt against the bank.

It was provided by section 48 of this act that it might be amended, "but no amendment thereto shall take effect or be in force until it shall have been submitted to a vote of the electors of the state, * * and been approved by a majority of all the votes cast on the subject."

The several State Banks organized under the general banking law, were taxed in this manner, until 1867, when a law *became operative*, Chap. 102, Laws 1866, by which holders of shares in both state and national banks were taxed upon an assessment and valuation of the shares of shareholders, and by which it was declared that "no tax shall *hereafter* be assessed upon the capital of any bank or banking association organized under the authority of this state."

Section 1, Art. VIII, Const. of Wis., provides that "*the rule of taxation shall be uniform*, and taxes shall be levied upon such property as the legislature shall prescribe," which provision it is held, requires that the rule of taxation must be general, and *applicable to all property alike, and that it prevents discrimination in favor of one kind of property, and against others*, but does not prevent the legislature from exempting from taxation such property as they shall see fit.

Attorney General v. Plank Road Co., 11 Wis., 35.

The validity of the tax upon state banks under the state banking law was questioned, upon the ground that the provisions of the state banking law on this subject, were in violation of the constitutional provision requiring the rule of taxtion to be uniform.

But it was held by the Supreme Court of Wisconsin, that by sections 4 and 5 of Art. XI, of the constitution of the state, there was a substantial reservation to the people themselves, of all legislative power upon the subject of banks and banking, and that the clause in the constitution which requires that "the rule of taxation shall be uniform," is a limitation upon the *legislature* in the exercise of its general power to levy taxes, and not a restriction upon the *people* in the exercise of the power thus *reserved*, and that the portion of the banking law which regulates the taxation of the capital stock of banks, was therefore not in violation of that clause of the constitution.

State ex. rel. Reedsburg Bank v. Hastings, 12 Wis., 47.

With the exception of taxes upon state banks and upon railroad property, taxation in Wisconsin has always been upon an annual valuation or assessment of the property taxed.

Thus the law remained until after the levying of the taxes in question under chapter 400, Laws of Wisconsin for 1865, relating to the taxation of shares in National Banks.

Section 1 of this act provides that "it shall be the duty of the assessor of any city, ward or town in which any banking association, created by authority of any law of the United States, may be located, to include in the valuation of the personal property of any person or corporation, *whether residing or located in or out of such city, town or ward*, the shares of such banking association, owned by such person or corporation, *at the par value of such shares*." It then provides how the assessor shall obtain a list of the shareholders and amount owned by each, and that he shall make a return thereof on or before the 1st day of December, specifying the number of shares belonging to them.

Section 2 declares that "such return *shall not be altered or equalized* by any other officer, but shall be delivered to the Clerk of the Board of Supervisors in each county, who shall immediately forward a copy thereof, certified under his hand and seal of office, to the State Treasurer. *Nor shall the value of shares so returned be included in the estimated basis of taxation. Nor shall any tax be levied thereon, except as herein directed.*"

Section 3 makes it "the duty of every owner or holder of any share or shares in such banking association, *whether resident or located*

within or without the state to pay to the State Treasurer on or before the 31st day of December in each year, *a tax for that year*, of one-and-one-half per centum on the par value of such stock, which tax shall be a lien upon such stock from and after the first day of July previous, until paid"; and further provides for the collection and enforcement of the tax and penalty for non-payment, by a sale by the State Treasurer at public auction of the shares whereon it is charged; and the fourth, fifth and sixth sections relate to the same matter.

The 7th section provides that "whenever the tax assessed upon other moneyed capital in the hands of individual citizens of the state, shall be less than one-and-one-half per centum, it shall be the duty of the State Treasurer to reduce correspondingly the tax upon the stock of the said banking associations, and to require the payment only of such reduced tax; and the 8th section declares that the real estate of such banking associations shall continue *to be assessed and taxed as other real estate.*

Two general questions were argued in the court below:

1st. Whether chapter 400, laws 1865, was in conformity with the provisions of the National Currency Act, which are as follows: "*Provided*, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate *being included in the valuation* of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority, at the place where such bank is located and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: *Provided further*, that the tax so imposed under the laws of any state upon the *shares* of any associations authorized by this act shall not exceed the rate imposed *upon the shares* in any of the banks organized under authority of the state where such association is located."

2d. Whether the taxation in question was not in violation of Sec. 1, Article VIII, Const. of Wis., which declares that "the rate of taxation shall be uniform."

Both questions were decided by the court against the plaintiff in error.

Van Slyke v. State, 23 Wis., 655.

This is a test case as to the validity of the taxes charged on shares in National Banks in Wisconsin for the years 1865 and 1866, before Chapter 102, Laws of 1866, became operative.

I.

The law of the state under which the taxation in question was had, is not in conformity with the 41st Section of the National Banking Act, because, under the law of the state (state banking act above cited, Sec. 16) *shares* in state banks and the interest of shareholders therein *are expressly exempted from taxation.*

It is declared that "*the owner or holders of shares of stock* in any such bank or banking association, *shall not be taxed as an individual* for such shares of stock." Laws of Wis. 1852, Ch. 479, Sec 16; R. S. Wis., Ch. 71, Sec. 20.

From the language of the 41st Section of the National Banking Act and the decisions of this court in the *Van Allen case*, 3 Wall. 581, and subsequent cases. It is submitted that the following propositions must be taken to be established :

1. That the power of taxation as to these shares is a concurrent power, from the exercise of which by the state, Congress by reason of its paramount authority, may exclude the states, or by withholding its exercise may leave the states free to act. *Van Allen*, case, 3 Wall. 385.

2. That subject to the qualifications contained in the 41st Section, congress has so legislated as to leave these shares subject to taxation, but as *a condition precedent* to the right to tax them, the state legislation must be first brought into harmony with the 41st Section, if the state has the ability to do so. "Exact conformity is required if attainable." *Lionberger vs. Rouse*, 9 Wall, 475.

3. "The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, &c." "This is a *distinct, independent* interest or property held by the shareholder like any other property which may belong to him. It is *this interest* which the act of congress has left subject to taxation by the states, under the limitations prescribed."

Van Allen Case, 3 Wall. 584.

4. If this corresponding interest or property in the *shares* in state banks is not taxed by the state when it has the power to frame laws for that purpose, then the state cannot lawfully tax shares in National banks. The interest or property of shareholders in state banks must be *directly* taxed in order to authorize the taxation of shares in National banks; the word "shares" having the same import as used in the 41st Section in reference to the interest of shareholders in *state* banks, as in respect to that of shareholders in *National* banks.

Van Allen vs. The Assessors, 3 Wall. 581, 602, 603.
Bradley vs. The People, 4 Wall. 459.
Lionberger vs. Rouse, 9 Wall, 473.

In *Bradley vs. The People, supra*, it is said "the act of the state dated February 14, 1857, provides for taxing the *capital stock* of the banks together with the surplus profits or reserved funds. *No tax is imposed specifically on the shares held by the stockholders.*"

"This question came before us in the case of *Van Allen v. The Assessors* 3 Wallace 573,581, from New York, where the statute taxing the state banks was substantially like that of Illinois. We there held the tax *unauthorized for the defect stated.*"

The same argument was advanced there which will doubtless be repeated in this case, that the taxation was *equivalent*; and the argument was answered, by saying "that admitting it to be so, yet inasmuch as the capital of the state banks *may* consist of the bonds of the United States, which were exempt from the state taxation, it was not easy to see that the tax on the *capital* was an equivalent to a tax on the *shares.*" Cases might arise in which in fact the taxes would not be equivalent, but if the uniform of method of taxation prescribed by the 41st, Sec. i. e. upon the *shares* in both instances, is observed then there could be no question as to the result, and the reason why taxation of the *shares* of state banks was made a condition precedent to the taxation of shares in National banks, is that congress well understood that in no way could unfriendly discriminations against shareholders in National banks be prevented, except by providing, as it has done: 1st, that the subject of taxation as to both must be the shares, and 2d, shares in National banks shall not be taxed at a greater rate than shares in state banks; thus securing uniformity both of method and of rate.

In the *Van Allen case* 3 Wall., 602,603. The Chief Justice in stating the concurrence of the minority with the majority of the Court as to the effect of the second proviso uses the following language: "The laws of New York brought under review in the case before us, provide for the taxation of the *shares* of National banking associations and for the taxation of the *capital* of the state banks, *but not of the shares*, while the second proviso of the act of Congress requires that the tax on shares of the former shall not exceed the tax on the shares of the latter. *It is clear that this taxation by the state is not in accordance with the authority given by Congress.* The variance might not be a matter of much practical importance if we agreed in opinion that taxation on capital and shares must be by the same rule. * * * * We think moreover that the second proviso is a substantive part of the act which cannot be disregarded and that it withholds from states whose policy does not allow the organization of banks and provide for the taxation of *shares*, the authority to tax the shares of the National banking associations."

In the case of *Lionberger v. Rouse, supra.*, the State or Missouri had ceded away the right of taxation as to two of her banks, and the court say " there is no way the state could compel them to relinquish their charters, *nor has it the power to tax their stockholders on their shares of stock.* Having contracted with these banks to accept from them, annually in lieu of taxes, one per cent. on their paid in *capital stock*, it cannot turn round and *assess a tax on the shareholders.*"

" As the state *did all that it could* to conform its legislation to the requirements of the law, it was therefore in a condition to impose the tax in question."

The state banking law of Wisconsin was by its express terms amendable in all particulars. It was amended in respect to taxing state banks in 1866, so that the *shares* of stockholders should be thereafter taxed and the provision taxing such banks upon their capital was repealed.

Laws of Wis., 1852, *Ch.* 479, *Sec.* 48.
Laws of Wis., 1866, *Ch.* 102.
State ex. rel., Reedsburg Bank, v. Hastings, 12 *Wis.* 47.

The state of Wisconsin, therefore had the ability to conform to the act so as to tax the shares in state banks ; it had not ceded away the right of taxation in that respect.

In the *Lionberger case* the court say: "without pursuing the subject further, it is enough to say, in our opinion, congress meant no more by the second limitation in the proviso to the 41st Section of the National Banking Act, than to require of each state *as a condition to the exercise of the power to tax the shares in National Banks*, that it should *as far as it had the capacity*, TAX IN LIKE MANNER THE SHARES of banks of issue of its own creation."

In *Wright vs. Stilts*, 27 Ind. 338, it is held "that the shares in national banks cannot be taxed in that state, for state and county purposes, for the *plain reason*, that no such tax is imposed on the *shares* of any of the banks organized under the authority of the state." And to the same effect is the case of *Hubbard v. Johnson*, 23 Iowa 130.

The tax upon state banks, under the general banking law will be found to be a *franchise* tax, or tax upon the franchise measured by the capital stock of the bank to which it is annexed. 6 Wall 631, 632. It is therefore a tax *upon the bank*, and in no sense a tax upon or against the *shares* in the hands of the share holders.

Corporate franchises are legal estates and not mere naked powers, but powers coupled with an interest which vest in the *corporation* by virtue of its charter.

Provident Institution v. Massachusetts 6 Wall 622 *et seq.*

This tax seems to have been considered as a *franchise* tax by the Supreme Court of Wisconsin in these and other cases. Regarded as a *property*, tax it would confessedly be a tax upon the capital of the bank and the bank would be entitled to make a deduction from its capital of such portion as might be invested in federal securities.

Bank tax case 2 Wall. 200.

Considered as a franchise tax, it is not even *indirectly a tax on the shares of stockholders.*

Banking franchises in every state of the Union are recognized as property. The banking *capital* attached to the franchise is *another* property, owned in its parts by persons corporate or natural, for which they are liable to be taxed, as they are for all other property for

the support of the government. The lands, buildings and *franchises*, &c., of canal, turnpike and railroad companies, are the *mere instruments* whereby the joint stock of the company is made to produce that profit; and moreover belong *exclusively to the corporate body*, which is altogether a *separate person* from the individual members.

Ang. & Ames Corp. 540.

In the case of *Bligh vs. Brent*, 2 You. & Coll., 268, 294, Baron Alderson explains at some length the nature of the interests of shareholders in the stock of these sorts of companies. "In the first place there is a corporation, to whose management the joint stock of the many, subscribed by its individual corporators, is intrusted. They have power at their pleasure, of vesting it in real estate or in personal estate, and of altering, from time to time the species of property they may choose to have; and in order to give greater facilities and advantages, certain powers are entrusted to the undertakers by the legislature. * * * These *powers* render the *use* of the joint stock by the body corporate more profitable, but they *form no part of the joint stock itself;* and one decided test is that they belong *inalienably* to the corporation; whereas all the joint stock is capable expressly, of being sold, exchanged, varied or disposed of, at the pleasure of the corporate body." Ang. & Ames on Corp. 607, 608. If a portion of the capital stock should be invested in real estate, it would scarcely be pretended that each shareholder would therefore be a freeholder. *Rex vs. Hull Dock Co.*, 1 Term, 219. *Lincoln vs. Barton*, 44 Barb., 156.

Taxes in the several states are levied almost universally upon a valuation, and it was intended by the proviso to the 41st Sec. to subject the shares in National banks to a *property* tax to be laid upon a *valuation* of the shares. The proviso is that nothing in this act shall be construed "to *prevent* all the shares in any of the said associations from *being included in the valuation* of the personal property of the holder, in the assessment of taxes imposed by or under *state* authority. Such property tax cannot be imposed on these shares unless a like property tax is directly imposed and at the same rate on shares in state banks.

A tax on the *franchise* of the state banks though equivalent in amount will not satisfy the conditions of the act of Congress.

The National banks pay a *franchise* tax to the government from which they derive their powers, of one-and-one-half per cent. on their circulation, and one quarter per cent. semi-annaally on so much of their capital as is not invested in United States bonds, and as a condition of the grant of corporate power, shares of shareholders are subject to a *property* tax, with which the *franchise* has no legal connection.

So the National banks pay a *franchise* tax to the federal government from which they derive their corporate powers.

Our State banks pay a *franchise* tax to the sovereignty from which they derive their powers of one and one half per cent. per annum.

It is attempted in this state to impose a *property* tax on *shares* in National banks, when the *shares* in State banks are *expressly* exempted from State taxation.

Each government having exacted a *franchise* tax, it remains to be seen whether the state can impose a *property* tax on *shares* in national banks when no corresponding *property* tax is imposed on *shares* in state banks. If it can, it is easy to see that the taxing authorities discriminate in favor of those interested in *state* banks and against those interested in *national* banks—a result which is conceded it was the design of congress to prevent.

These considerations seem to us quite sufficient to show that the fact that a *franchise* tax is imposed on state banks no more than *equivalent* to the *property* tax claimed against shares in national banks, will not support the taxation in question, but that it is clearly against the letter and spirit of the act of congress. The statement of these propositions, shows clearly that a *direct* tax on the *shares* is an indispensible pre-requisite to the power of the state to tax *shares* in national banks.

2. Again, it is submitted that the proviso to the 41st Section of the National Banking Act, has to a certain extent prescribed a method for the exercise of the power of taxation by the states, in reference to shares in National Banks, and the states are clearly restricted to this mode. The language of the proviso, that nothing in the act shall prevent all the shares in any of the said associations held &c, from being *included in the valuation* of the personal property of such person in the assessment of taxes imposed by or under state authority, requires that these shares shall be taxed upon a valuation above or be-

low par as the fact, as to their real value may be, as other personal estate is assessed and taxed under the state laws.

The words "from being included in the *valuation* of the personal property of such person" must not be rejected; and they obviously mean that the property shall be valued in the manner other personal estate is, in the execution of the taxing laws.

The proviso is not that nothing shall prevent the States from taxing these shares, provided, &c. Had it been to this effect it would have left the manner of taxation, subject to the remainder of the proviso, entirely to the several states.

But here a certain course is authorizedand required, and this and no other can be pursued.

The expression of one method of proceeding is upon well settled principles of interpretation and construction the exclusion of all others.

The *method* of proceeding is a part of the right and there is no legal ground upon which the right can be exercised without observing the conditions upon which it was granted, or its exercise is permitted.

And it is a well settled rule that a statute imposing a tax or restraining the power of taxation must be complied with strictly, and in all its essential provisions; and it is not permissible to adopt a course not authorized by the statute, upon the principle that is or may be in its results, equivalent to the requirements of the statute.

Van Allen vs. Assessors, 3 Wall 602-3.
Rathbun vs. Acker, 18 Barb. 393.
Wheeler vs. City of Chicago, 24 Ill. 107.
Thurston vs. Prentice, 1 Man (Mich.) 194.
Sewell vs. Jones, 9 Pick 414.
Dwarris on Statutes, 743, 749, 767.
City of Pittsburgh vs. First National Bank, 55, Pa. St. 45.
Markoe vs. Hartrauft, 15 Am. Law Reg. 489.

Sec. 1, Ch. 400, Laws of Wis. for 1865, under which the taxes in question were charged, provides that the shares shall be included in the valuation of personal property, but fixes an *arbitrary* valuation for *all shares alike*, and Section 2 provides that such valuation *shall not be equalized or altered* by any other officer, as the assessment of other taxable property is; and that the value of such shares shall not be included in the estimated basis of taxation.

It was vitally important that the valuation of shares in national banks should be included in the *basis* for the apportionment of taxes, in order to comply with that provision of the 41st Section, which limits the rate of taxation on these shares, to the rate assessed on other moneyed capital, in the hands of individual citizens of this state. The right to impose and collect the tax depends upon a uniformity of mode in ascertaining, assessing and equalizing the value of such shares, and the value of "other moneyed capital in the hands of individual citizens of this state." Where totally diverse and different systems of taxation are resorted to, which must necessarily result in that inequality which the act of congress was framed to prevent, it is clear that the tax cannot be held to be valid, nor that the state, under such legislation had any authority to impose it. The state legislation and congressional legislation are not in harmony, and this is enough to defeat the right to impose the tax under these acts.

II.

That the taxes in question were levied and charged in accordance with a rule different from that prescribed for the taxation of all other property has not been and cannot be denied:—

1st. It fixes an *arbitrary* valuation for all shares alike at par, while all other property is assessed at its actual cash value.

2d. By providing that the value of such shares shall not be equalized, as is the valuation of other property.

3d. By providing that the arbitrary valuation thus fixed shall not form any part of the basis for apportioning taxes, as does the valuation of other property.

This statute is therefore in violation of Sec. 1, Art. 8 of the Constitution of Wisconsin which requires "that the rule of taxation shall be uniform."

Attorney General vs. Plank Road Co., 11 Wis. 35.
Knowlton vs. Supervisors, 9 Wis. 410.

It is held in these cases that this constitutional provisions was designed to prevent discrimination in favor of one kind of property and against others; that the rule of taxation must be general and applicable to all taxable property alike and that it is not complied with by

dividing property into different classes, and preserving equality in *each class* of property, but fixing a different rate for the different classes; that whenever the power of state taxation attaches the uniform rule of taxation prescribed, attaches with it and becomes a part of the power and must be strictly observed.

The Supreme Court of Wisconsin has constantly adhered to these principles, and the construction of this provision announced in these cases; taxation of state banks upon a different rule having been upheld on the special ground already stated—*State Ex. Rel. Reedsburg Bank v. Hastings*, 12 Wis. 47.

The Wisconsin court did not decide in this case, that the taxation in question was according to a uniform rule, but that the effect and operation of the act of congress of June 3, 1864, was to supersede and over-ride the uniform rule prescribed by the constitution of the state, as to the taxation of shares in national banks.

Van Slyke v. the State, 23 Wis. 667.
Record in this cause fol. 27.

The Supreme Court regarded the language of the 41st Section as imperative and not as permissive merely; that the shares *must* be taxed, not that they might be under certain conditions, and as having fixed a different rule of taxation, and that therefore the provisions of the state constitution must yield to the paramount authority of the act of congress as it construed it; and some stress was laid upon the fact that these shares were "a *new species* of property, brought into existence by the superior power of the federal government."

Whether the Supreme Court of Wisconsin was right in giving this construction to the act of congress of June 3, 1864, is a question of *federal* jurisprudence, and the ruling of the state court therein is reviewable in this court upon this writ.

It is not correct to say that the question is one of *state* jurisprudence only, and therefore the decision of the state court is conclusive.

The error assigned in this connection is the construction, and effect thus given to the Act of Congress of June 3, 1864, Sec. 41.

1. The taxation contemplated by the 41st section of the banking act is to be "by and under state authority," and except as restricted

by the provisos in question, the states are left as free to act in the premises, as in regard to the taxation of the lands within their limits.

The act of Congress does not require that shares in the National Banks *shall* be taxed, irrespective of the question whether the state has conformed its legislation to the requirements of the 41st Sec; it has only provided that within certain limits such taxation *may* take place.

2. There is no conflict between the provisons of the 41st Section, and the rule of uniformity of taxation prescribed by the State Constitution.

The consequence of a want of conformity to the laws to the State laws to the 41st Section, would not justify the state in resorting to a method of taxation in violation of its own constitution.

The citizen of Wisconsin who invested his money in shares in National Banks has not thereby forfeited or surrendered his right to the protection of the constitutional rule of uniformity in the taxation of his shares. Such is not the effect of the Act of Congress. There is nothing in the act in conflict with or subversion of the uniform rule of taxation, prescribed by the state Constitution,—nor has Congress prescribbed a mode of taxation of the shares in National banks which in any sense whatever conflicts or interferes with the application of the Constitutional rule of uniformity.

Since 1866 the state found no difficulty in bringing its legislation into entire harmony with the act of congress and in observing at the same time the constitutional rule of taxation. Laws of Wis. 1866, chapter 102.

As to the *novelty* of this kind of property brought into existence by the superior power of the general government, it is submitted that had the act of congress been silent on the subject, the power of the states to tax would have existed.

Shares in the old United States bank were held to be subject to state taxation. They were brought into existence by the same authority as shares in national banks.

Utica v. Churchill, 33 N. Y. 234.
Barlow v. Charleston, Nott & McCord 527.
State v. Collectors, 2 Bailey 654.

And if subject to state taxation it may be taxed as all other property is taxed, in the absence of any express or implied restriction by Congress. See *McCulloch v. Maryland*, 4, *Wheat* 436. Where the power of the state to tax attaches, all the state rules of taxation apply with it and as a part of it.

III.

The right of the plaintiff to recover a tax illegally imposed but paid under protest, was argued in the court below; but not decided but about this there can be no doubt.

Dows v. Chicago, 11 Wall. 112.
Joyner v. School Dist., 3, Cush 567.

For these reasons to-wit: 1st, For holding that the state legislation in question was in conformity with the 41st, Sec. of the act of Congress of June 3, 1864 and that it authorized the taxation in question.

2d. For holding that the construction and effect of the act of Congress was to suspend and supersede the operation of the uniform rule of taxation prescribed by the Constitution of Wisconsin, as to the taxation of shrres in National banks; it is submitted that the judgment of the Supreme Court of Wisconsin should be reversed.

S. U. PINNEY,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 262.—December Term, A. D. 1870.

BENJAMIN BAGNALL,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

ABSTRACT AND BRIEF.

S. U. PINNEY,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 262.—December Term, A. D. 1870.

BENJAMIN BAGNALL,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

Action brought against the State of Wisconsin in the manner provided by its Constitution and Section 14, Chapter 136, Laws of Wisconsin for 1868, to recover back the taxes assessed and charged upon one share in the First National Bank of Milwaukee, owned by the plaintiff in error, for the years 1865 and 1866, under Chapter 400, Laws of Wisconsin for 1865, and re-assessed and re-levied against the same under the provisions of said Chapter 136, Laws 1868.

The capital stock of such bank consisted of and was all invested in stocks and bonds of the United States.

Section 14, Chapter 136, Laws 1868, provides that any shareholder in a National Bank might at any time before the 1st of May, 1869, pay the amount of tax required to be levied and collected upon his share or shares, and might immediately after such payment bring and maintain an action against the state in the Supreme Court thereof to recover back the money so paid, in which action the payment so made shall be taken and deemed to have been compulsory and not voluntary, and providing in substance that in case the plaintiff should recover, then the taxes re-assessed and collected under this act or collected under the law of 1865, should be refunded with six per cent. interest, &c.

It is claimed that the taxes in question were not assessed and charged, or re-assessed in conformity with the provisions of Section 41, of the National Banking Act of June 3, 1864, and that no authority existed on the part of the state to assess and charge the same in the first instance, nor to re-assess the same under the act of 1868, already cited; that the taxation in question was in violation of the uniform rule of taxation prescribed by the Constitution of Wisconsin; that the Supreme Court of the state erroneously decided that the effect of the provisions of the 41st Section of the Banking Act, was to dispense with and supersede this uniform rule as to shares in National Banks.

These questions were presented by demurrer to the complaint, which was sustained by the Supreme Court of Wisconsin, (but two Justices sitting, the third having been prior to his appointment, of counsel in the matter here involved), and the case comes to this court under the 25th section of Judiciary Act, by writ of error to Supreme Court of Wisconsin, upon the judgment rendered by that court in favor of the defendant upon such demurrer.

The complaint, the judgment upon the demurrer (Record, Fol. 25), and the opinion of the court (Record, Fol. 19), show what questions were involved, and that they are such as are reviewable upon this writ; —and the sustaining of the demurrer and rendering judgment thereon for the defendant is assigned as error.

The provisions of the constitution and laws of Wisconsin, necessary to a proper understanding of the case, are as follows: By Sec. 5, Art. XI, Const. Wis., the legislature were authorized to submit the question of "bank or no bank" to the voters at a general election, and if they voted in favor of banks, then the legislature were empowered to pass a general banking law, but no such law should have any force or effect until submitted to a vote of the electors of the state at some general election, and approved by a majority of the votes cast at such election, and by sec. 4 of said article it was declared that the legislature should not "have power to create, authorize or incorporate by general or special law any bank or banking power or privilege or except as provided in said article."

Pursuant to these provisions the general banking law of 1852 was enacted and approved, under which our state banks were organized—Chapter 479, Laws of Wisconsin for 1852. By the 16th section of this

act it was provided that "*every bank and banking association* organized under the provisions of this act, shall pay to the State Treasurer, on the first day of January and July of each year a semi-annual tax of three-fourths of one per centum *on the amount of capital stock* of each bank or banking association; the first payment of such tax to be computed at the rate of one-and-a-half per cent. per annum from the time of filing the certificate of incorporation to the first day of January or July then next succeeding. * * * Said capital stock *shall be exempt from all other taxes*, except on that portion of said capital stock which shall consist of and include the real property of such bank or banking association; and the real property of all banks and banking associations shall be assessed and taxed in the city, ward, village or town where the same is located, for all state, county, town and corporation purposes, in the name of such bank or banking association; *provided*, that the *owner or holder of shares of stock in any bank or banking association shall not be taxed as an individual for such shares of stock.*" This section also provides that if any bank neglects or refuses to pay such tax for thirty days it shall forfeit and pay to the State Treasurer one per centum on the amount of its capital stock; that the tax shall be a lien on the interest of the securities of the bank in the hands of the State Treasurer; that he may collect and apply such interest to the payment of the tax and forfeiture and if any balance remains unpaid, he may collect it by action of debt against the bank.

It was provided by section 48 of this act that it might be amended, "but no amendment thereto shall take effect or be in force until it shall have been submitted to a vote of the electors of the state, * * and been approved by a majority of all the votes cast on the subject."

The several State Banks organized under the general banking law, were taxed in this manner, until 1867, when a law *became operative*, Chap. 102, Laws 1866, by which holders of shares in both state and national banks were taxed upon an assessment and valuation of the shares of shareholders, and by which it was declared that "no tax shall *hereafter* be assessed upon the capital of any bank or banking association organized under the authority of this state."

Section 1, Art. VIII, Const. of Wis., provides that "*the rule of taxation shall be uniform*, and taxes shall be levied upon such property as the legislature shall prescribe," which provision it is held, re-

quires that the rule of taxation must be general, and *applicable to all property alike, and that it prevents discrimination in favor of one kind of property, and against others*, but does not prevent the legislature from exempting from taxation such property as they shall see fit.

Attorney General v. Plank Road Co., 11 Wis., 35.

The validity of the tax upon state banks under the state banking law was questioned, upon the ground that the provisions of the state banking law on this subject, were in violation of the constitutional provision requiring the rule of taxtion to be uniform.

But it was held by the Supreme Court of Wisconsin, that by sections 4 and 5 of Art. XI, of the constitution of the state, there was a substantial reservation to the people themselves, of all legislative power upon the subject of banks and banking, and that the clause in the constitution which requires that "the rule of taxation shall be uniform," is a limitation upon the *legislature* in the exercise of its general power to levy taxes, and not a restriction upon the *people* in the exercise of the power thus *reserved*, and that the portion of the banking law which regulates the taxation of the capital stock of banks, was therefore not in violation of that clause of the constitution.

State ex. rel. Reedsburg Bank v. Hastings, 12 Wis., 47.

With the exception of taxes upon state banks and upon railroad property, taxation in Wisconsin has always been upon an annual valuation or assessment of the property taxed.

Thus the law remained until after the levying of the taxes in question under chapter 400, Laws of Wisconsin for 1865, relating to the taxation of shares in National Banks.

Section 1 of this act provides that "it shall be the duty of the assessor of any city, ward or town in which any banking association, created by authority of any law of the United States, may be located, to include in the valuation of the personal property of any person or corporation, *whether residing or located in or out of such city, town or ward*, the shares of such banking association, owned by such person or corporation, *at the par value of such shares*." It then provides how the as-

sessor shall obtain a list of the shareholders and amount owned by each, and that he shall make a return thereof on or before the 1st day of December, specifying the number of shares belonging to them.

Section 2 declares that "such return *shall not be altered or equalized* by any other officer, but shall be delivered to the Clerk of the Board of Supervisors in each county, who shall immediately forward a copy thereof, certified under his hand and seal of office, to the State Treasurer. *Nor shall the value of shares so returned be included in the estimated basis of taxation. Nor shall any tax be levied thereon, except as herein directed.*"

Section 3 makes it "the duty of every owner or holder of any share or shares in such banking association, *whether resident or located within or without the state* to pay to the State Treasurer on or before the 31st day of December in each year, *a tax for that year*, of one-and-one-half per centum on the par value of such stock, which tax shall be a lien upon such stock from and after the first day of July previous, until paid"; and further provides for the collection and enforcement of the tax and penalty for non-payment, by a sale by the State Treasurer at public auction of the shares whereon it is charged; and the fourth, fifth and sixth sections relate to the same matter.

The 7th section provides that "whenever the tax assessed upon other moneyed capital in the hands of individual citizens of the state, shall be less than one-and-one-half per centum, it shall be the duty of the State Treasurer to reduce correspondingly the tax upon the stock of the said banking associations, and to require the payment only of such reduced tax; and the 8th section declares that the real estate of such banking associations shall continue *to be assessed and taxed as other real estate.*

The provisions of the act of 1868, under which these taxes were re-assessed, are as follows, to wit:

Section 1 makes it the duty of the State Treasurer to transmit as soon as practicable to the assessor of every city, ward or town in the state in which is located a National Bank, a statement prepared from the best information in his reach, showing the date of the organization of the bank, the amount of its capital stock, and the names of the persons who were shareholders in such banks on the 5th day of June, 1865, and on the 5th day of June, 1866, and the number of shares

held then by each, and stating whether the taxes due the state for the year 1865 or 1866, or for both of said years remained unpaid.

Section 2 makes it the duty of such assessor to include in the valuation of the personal property for the year 1868 of any person or corporation, *whether residing or located in or out of such city, &c.*, the shares of such banking association, which were owned by such person at the time fixed by law for the assessment of personal property in each of the years for which taxes thereon appear to remain unpaid; and to assess such shares *at their true cash value at such* time, but such shares *shall in no case be assessed at more than their par value.*

The third section provides further means for obtaining names of shareholders.

Section 4 provides means for ascertaining value of shares.

Section 5 makes it the duty of the clerk of the city, village or town in which such bank is located to set down on the proper assessment roll, opposite the name of each owner of such shares for each of said years therein mentioned, separately, the same per centum of rate of tax which was in such year assessed and levied upon other moneyed capital in the hands of individual citizens of the state, *in such city, ward, village or town*, and no greater rate. *Provided, however*, that the per centum or rate so to be set down shall not in any case exceed the rate of one-and-one-half per centum upon the assssed value of such shares. *And provided, further*, that if the organization of any such bank took place after the first day of January in either of said years, then the tax so to be set down for such year shall be reduced so as to bear such proportion to the rate above provided for as the part of the year unexpired at the date of its organization, bore to the whole year.

Sections six and seven provide for the collection of such taxes, and Section 8 declares that no tax levied under the provisions of this act shall be held invalid for want of form, or for any mere omission which does not affect the substantial justice of such tax.

Section 13 provides that "*the value of bank shares assessed under this act shall not be included in the basis for apportionment of taxes.*"

Section 14 provides for bringing actions to test the validity of such taxation, and has been cited on the first page of this brief, and Section 15 provides that all acts and parts of acts coming within the provision of this act, so far as they conflict with the provisions of this act, are repealed.

By the provisions of the tax laws of Wisconsin, all other moneyed capital in the hands of individual citizens of the state, was taxed upon an actual valuation and assessment, equalized first by the city, village or town board, then by the county board, and finally, by a state board of equalization, and taxes were apportioned on such equalized value, which was used as a basis of ~~valuation~~ taxation

Three general questions were argued in the court below:

1st. Whether chapter 400, laws 1865, was in conformity with the provisions of the National Currency Act, which are as follows: "*Provided*, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate *being included in the valuation* of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority, at the place where such bank is located and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: *Provided further*, that the tax so imposed under the laws of any state upon the *shares* of any associations authorized by this act shall not exceed the rate imposed *upon the shares* in any of the banks organized under authority of the state where such association is located."

2d. Whether the taxation in question was not in violation of Sec. 1, Article VIII, Const. of Wis., which declares that "the rate of taxation shall be uniform."

3d. That inasmuch as the act of 1865, Chapter 400, was not in conformity with the provisions of the 41st Section of the National Banking Act, and any tax levied under such chapter would be void, and would be imposed without jurisdiction or authority; shares in the National Banks were really exempted from state taxation until the state should adopt appropriate legislation; and that the act of 1868 for re-assessing the taxes is void as being in controvention of the 41st Section, and that the state could only re-assess a tax which it had *authority* to impose in the first instance. The right to tax must have existed, and such legislation as is in question here, could not extend further than to cure the defective execution of *an existing power*.

These questions were decided by the court against the plaintiff in error. (Record, Fols. 18, 25–28.)

Van Slyke v. State, 23 Wis., 655.
Bagnall v. State, 25 Wis., 112.

This is a test case as to the validity of the taxes charged on shares in National Banks in Wisconsin for the years 1865 and 1866, before Chapter 102, Laws of 1866, became operative, and re-assessed under Chapter 136, Laws 1868.

I.

The law of the state under which the taxation in question was had, is not in conformity with the 41st Section of the National Banking Act, because, under the law of the state (state banking act above cited, Sec. 16) *shares* in state banks and the interest of shareholders therein *are expressly exempted from taxation.*

It is declared that "*the owner or holders of shares of stock* in any such bank or banking association, *shall not be taxed as an individual* for such shares of stock." Laws of Wis. 1852, Ch. 479, Sec 16; R. S. Wis., Ch. 71, Sec. 20.

From the language of the 41st Section of the National Banking Act and the decisions of this court in the *Van Allen case*, 3 Wall. 581, and subsequent cases. It is submitted that the following propositions must be taken to be established :

1. That the power of taxation as to these shares is a concurrent power, from the exercise of which by the state, Congress by reason of its paramount authority, may exclude the states, or by withholding its exercise may leave the states free to act. *Van Allen*, case, 3 Wall. 385.

2. That subject to the qualifications contained in the 41st Section, congress has so legislated as to leave these shares subject to taxation, but as *a condition precedent* to the right to tax them, the state legislation must be first brought into harmony with the 41st Section, if the state has the ability to do so. "Exact conformity is required if attainable." *Lionberger vs. Rouse*, 9 Wall, 475.

3. "The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, &c." "This is a *distinct, independent* interest or property held by the shareholder like any other property which may belong to him. It is *this interest* which the act of congress has left subject to taxation by the states, under the limitations prescribed."

Van Allen Case, 3 Wall. 584.

4. If this corresponding interest or property in the *shares* in state banks is not taxed by the state when it has the power to frame laws for that purpose, then the state cannot lawfully tax shares in National banks. The interest or property of shareholders in state banks must be *directly* taxed in order to authorize the taxation of shares in National banks; the word "shares" having the same import as used in the 41st Section in reference to the interest of shareholders in *state* banks, as in respect to that of shareholders in *National* banks.

Van Allen vs. The Assessors, 3 Wall. 581, 602, 603.
Bradley vs. The People, 4 Wall. 459.
Lionberger vs. Rouse, 9 Wall, 473.

In *Bradley vs. The People, supra*, it is said "the act of the state dated February 14, 1857, provides for taxing the *capital stock* of the banks together with the surplus profits or reserved funds. *No tax is imposed specifically on the shares held by the stockholders.*"

The same argument was advanced there which will doubtless be repeated in this case, that the taxation was *equivalent*; and the argument was answered, by saying "that admitting it to be so, yet inasmuch as the capital of the state banks *may* consist of the bonds of the United States, which were exempt from the state taxation, it was not easy to see that the tax on the *capital* was an equivalent to a tax on the *shares*." Cases might arise in which in fact the taxes would not be equivalent. but if the uniform of method of taxation prescribed by the 41st, Sec. i. e. upon the *shares* in both instances, is observed then there could be no question as to the result. and the reason why taxation of the *shares* of state banks was made a condition precedent to the taxation of shares in National banks, is that congress well understood that in no way could unfriendly discriminations against shareholders in National banks be prevented, except by providing, as it has done: 1st, that the subject of taxation as to both must be the shares, and 2d, shares in National banks shall not be taxed at a greater rate than shares in state banks; thus securing uniformity both of method and of rate.

In the *Van Allen case* 3 Wall., 602,603. The Chief Justice, in stating the concurrence of the minority with the majority of the Court as to the effect of the second proviso uses the following language: "The laws of New York brought under review in the case before us, provide for the taxation of the *shares* of National banking associations and for the taxation of the *capital* of the state banks, *but not of the shares*, while the second proviso of the act of Congress requires that the tax on shares of the former shall not exceed the tax on the shares of the latter. *It is clear that this taxation by the state is not in accordance with the authority given by Congress*. The variance might not be a matter of much practical importance if we agreed in opinion that taxation on capital and shares must be by the same rule. * * * * We think moreover that the second proviso is a substantive part of the act which cannot be disregarded and that it withholds from states whose policy does not allow the organization of banks and provide for the taxation of *shares*, the authority to tax the shares of the National banking associations."

In the case of *Lionberger v. Rouse, supra.*, the State or Missouri had ceded away the right of taxation as to two of her banks, and the court say " there is no way the state could compel them to relinquish their charters, *nor has it the power to tax their stockholders on their shares of stock*. Having contracted with these banks to accept from them, annually in lieu of taxes, one per cent. on their paid in *capital stock*, it cannot turn round and *assess a tax on the shareholders*."

" As the state *did all that it could* to conform its legislation to the requirements of the law, it was therefore in a condition to impose the tax in question."

The state banking law of Wisconsin was by its express terms amendable in all particulars. It was amended in respect to taxing state banks in 1866, so that the *shares* of stockholders should be thereafter taxed and the provision taxing such banks upon their capital was repealed.

Laws of Wis., 1852, *Ch.* 479, *Sec.* 48.
Laws of Wis., 1866, *Ch.* 102.
State ex. rel., Reedsburg Bank, v. Hastings, 12 *Wis.* 47.

The state of Wisconsin, therefore had the ability to conform to the act so as to tax the shares in state banks ; it had not ceded away the right of taxation in that respect.

In the *Lionberger case* the court say: "without pursuing the subject further, it is enough to say, in our opinion, congress meant no more by the second limitation in the proviso to the 41st Section of the National Banking Act, than to require of each state *as a condition to the exercise of the power to tax the shares in National Banks*, that it should *as far as it had the capacity*, TAX IN LIKE MANNER THE SHARES of banks of issue of its own creation."

In *Wright vs. Stilts*, 27 Ind. 338, it is held "that the shares in national banks cannot be taxed in that state, for state and county purposes, for the *plain reason*, that no such tax is imposed on the *shares* of any of the banks organized under the authority of the state." And to the same effect is the case of *Hubbard v. Johnson*, 23 Iowa 130.

The tax upon state banks, under the general banking law will be found to be a *franchise* tax, or tax upon the franchise measured by the capital stock of the bank to which it is annexed. 6 Wall 631, 632. It is therefore a tax *upon the bank*, and in no sense a tax upon or against the *shares* in the hands of the share holders.

Corporate franchises are legal estates and not mere naked powers, but powers coupled with an interest which vest in the *corporation* by virtue of its charter.

Provident Institution v. Massachusetts 6 Wall 622 *et seq.*

This tax seems to have been considered as a *franchise* tax by the Supreme Court of Wisconsin in these and other cases. Regarded as a *property*, tax it would confessedly be a tax upon the capital of the bank and the bank would be entitled to make a deduction from its capital of such portion as might be invested in federal securities.

Bank tax case 2 Wall. 200.

Considered as a franchise tax, it is not even *indirectly a tax on the shares of stockholders.*

Banking franchises in every state of the Union are recognized as property. The banking *capital* attached to the franchise is *another* property, owned in its parts by persons corporate or natural, for which they are liable to be taxed, as they are for all other property for

the support of the government. The lands, buildings and *franchises*, &c., of canal, turnpike and railroad companies, are the *mere instruments* whereby the joint stock of the company is made to produce that profit; and moreover belong *exclusively to the corporate body*, which is altogether a *separate person* from the individual members.

Ang. & Ames Corp. 540.

In the case of *Bligh vs. Brent*, 2 You. & Coll., 268, 294, Baron Alderson explains at some length the nature of the interests of shareholders in the stock of these sorts of companies. "In the first place there is a corporation, to whose management the joint stock of the many, subscribed by its individual corporators, is intrusted. They have power at their pleasure, of vesting it in real estate or in personal estate, and of altering, from time to time the species of property they may choose to have; and in order to give greater facilities and advantages, certain powers are entrusted to the undertakers by the legislature. * * * These *powers* render the *use* of the joint stock by the body corporate more profitable, but they *form no part of the joint stock itself;* and one decided test is that they belong *inalienably* to the corporation; whereas all the joint stock is capable expressly, of being sold, exchanged, varied or disposed of, at the pleasure of the corporate body." Ang. & Ames on Corp. 607, 608. If a portion of the capital stock should be invested in real estate, it would scarcely be pretended that each shareholder would therefore be a freeholder. *Rex vs. Hull Dock Co.*, 1 Term, 219. *Lincoln vs. Barton*, 44 Barb., 156.

Taxes in the several states are levied almost universally upon a valuation, and it was intended by the proviso to the 41st Sec. to subject the shares in National banks to a *property* tax to be laid upon a *valuation* of the shares. The proviso is that nothing in this act shall be construed "to *prevent* all the shares in any of the said associations from *being included in the valuation* of the personal property of the holder, in the assessment of taxes imposed by or under *state* authority. Such property tax cannot be imposed on these shares unless a like property tax is directly imposed and at the same rate on shares in state banks.

A tax on the *franchise* of the state banks though equivalent in amount will not satisfy the conditions of the act of Congress.

The National banks pay a *franchise* tax to the government from which they derive their powers, of one-and-one-half per cent. on their circulation, and one quarter per cent. semi-annaally on so much of their capital as is not invested in United States bonds, and as a condition of the grant of corporate power, shares of shareholders are subject to a *property* tax, with which the *franchise* has no legal connection.

So the National banks pay a *franchise* tax to the federal government from which they derive their corporate powers.

Our State banks pay a *franchise* tax to the sovereignty from which they derive their powers of one and one half per cent. per annum.

It is attempted in this state to impose a *property* tax on *shares* in National banks, when the *shares* in State banks are *expressly* exempted from State taxation.

Each government having exacted a *franchise* tax, it remains to be seen whether the state can impose a *property* tax on *shares* in national banks when no corresponding *property* tax is imposed on *shares* in state banks. If it can, it is easy to see that the taxing authorities discriminate in favor of those interested in *state* banks and against those interested in *national* banks—a result which is conceded it was the design of congress to prevent.

These considerations seem to us quite sufficient to show that the fact that a *franchise* tax is imposed on state banks no more than *equivalent* to the *property* tax claimed against shares in national banks, will not support the taxation in question, but that it is clearly against the letter and spirit of the act of congress. The statement of these propositions, shows clearly that a *direct* tax on the *shares* is an indispensible pre-requisite to the power of the state to tax *shares* in national banks.

2. Again, it is submitted that the proviso to the 41st Section of the National Banking Act, has to a certain extent prescribed a method for the exercise of the power of taxation by the states, in reference to shares in National Banks, and the states are clearly restricted to this mode. The language of the proviso, that nothing in the act shall prevent all the shares in any of the said associations held &c, from being *included in the valuation* of the personal property of such person in the assessment of taxes imposed by or under state authority, requires that these shares shall be taxed upon a valuation above or be-

low par as the fact, as to their real value may be, as other personal estate is assessed and taxed under the state laws.

The words "from being included in the *valuation* of the personal property of such person" must not be rejected; and they obviously mean that the property shall be valued in the manner other personal estate is, in the execution of the taxing laws.

The proviso is not that nothing shall prevent the States from taxing these shares, provided, &c. Had it been to this effect it would have left the manner of taxation, subject to the remainder of the proviso, entirely to the several states.

But here a certain course is authorizedand required, and this and no other can be pursued.

The expression of one method of proceeding is upon well settled principles of interpretation and construction the exclusion of all others.

The *method* of proceeding is a part of the right and there is no legal ground upon which the right can be exercised without observing the conditions upon which it was granted, or its exercise is permitted.

And it is a well settled rule that a statute imposing a tax or restraining the power of taxation must be complied with strictly, and in all its essential provisions; and it is not permissible to adopt a course not authorized by the statute, upon the principle that is or may be in its results, equivalent to the requirements of the statute.

Van Allen vs. Assessors, 3 Wall 602-3.
Rathbun vs. Acker, 18 Barb. 393.
Wheeler vs. City of Chicago, 24 Ill. 107.
Thurston vs. Prentice, 1 Man (Mich.) 194.
Sewell vs. Jones, 9 Pick 414.
Dwarris on Statutes, 743, 749, 767.
City of Pittsburgh vs. First National Bank, 55, Pa. St. 45.
Markoe vs. Hartrauft, 15 Am. Law Reg. 489.

Sec. 1, Ch. 400, Laws of Wis. for 1865, under which the taxes in question were charged, provides that the shares shall be included in the valuation of personal property, but fixes an *arbitrary* valuation for *all shares alike*, and Section 2 provides that such valuation *shall not be equalized or altered* by any other officer, as the assessment of other taxable property is; and that the value of such shares shall not be included in the estimated basis of taxation.

It was vitally important that the valuation of shares in national banks should be included in the *basis* for the apportionment of taxes, in order to comply with that provision of the 41st Section, which limits the rate of taxation on these shares, to the rate assessed on other moneyed capital, in the hands of individual citizens of this state. The right to impose and collect the tax depends upon a uniformity of mode in ascertaining, assessing and equalizing the value of such shares, and the value of "other moneyed capital in the hands of individual citizens of this state." Where totally diverse and different systems of taxation are resorted to, which must necessarily result in that inequality which the act of congress was framed to prevent, it is clear that the tax cannot be held to be valid, nor that the state, under such legislation had any authority to impose it. The state legislation and congressional legislation are not in harmony, and this is enough to defeat the right to impose the tax under these acts.

II.

That the taxes in question were levied and charged in accordance with a rule different from that prescribed for the taxation of all other property has not been and cannot be denied:—

1st. It provides that shares "shall in no case be assessed at more than their par value"; thus as between shares which are at a premium and those which are worth less than par, it produces a want of uniformity of taxation; and so does it as between all other monied capital or other property which is taxed upon its full value, while shares at a premium are not. It is like a provision that no horse shall be assessed at more than $200 whatever its value, while all other property is assessed at its real value.

2d. By providing that the value of such shares shall not be equalized, as is the valuation of other property.

3d. By providing that the arbitrary valuation thus fixed shall not form any part of the basis for apportioning taxes, as does the valuation of other property.

This statute is therefore in violation of Sec. 1, Art. 8 of the Constitution of Wisconsin which requires "that the rule of taxation shall be uniform."

Attorney General vs. Plank Road Co., 11 Wis. 35.
Knowlton vs. Supervisors, 9 Wis. 410.

It is held in these cases that this constitutional provisions was designed to prevent discrimination in favor of one kind of property and against others; that the rule of taxation must be general and applicable to all taxable property alike and that it is not complied with by dividing property into different classes, and preserving equality in *each class* of property, but fixing a different rate for the different classes; that whenever the power of state taxation attaches the uniform rule of taxation prescribed, attaches with it and becomes a part of the power and must be strictly observed.

The Supreme Court of Wisconsin has constantly adhered to these principles, and the construction of this provision announced in these cases; taxation of state banks upon a different rule having been upheld on the special ground already stated—*State Ex. Rel. Reedsburg Bank v. Hastings*, 12 Wis. 47.

The Wisconsin court did not decide in this case, that the taxation in question was according to a uniform rule, but that the effect and operation of the act of congress of June 3, 1864, was to supersede and over-ride the uniform rule prescribed by the constitution of the state, as to the taxation of shares in national banks.

Van Slyke v. the State, 23 Wis. 667.
Record in this cause fol. 27.

The Supreme Court regarded the language of the 41st Section as imperative and not as permissive merely; that the shares *must* be taxed, not that they might be under certain conditions, and as having fixed a different rule of taxation, and that therefore the provisions of the state constitution must yield to the paramount authority of the act of congress as it construed it; and some stress was laid upon the fact that these shares were "a *new species* of property, brought into existence by the superior power of the federal government."

Whether the Supreme Court of Wisconsin was right in giving this construction to the act of congress of June 3, 1864, is a question of *federal* jurisprudence, and the ruling of the state court therein is reviewable in this court upon this writ.

It is not correct to say that the question is one of *state* jurisprudence only, and therefore the decision of the state court is conclusive.

The error assigned in this connection is the construction, and effect thus given to the Act of Congress of June 3, 1864, Sec. 41.

1. The taxation contemplated by the 41st section of the banking act is to be "by and under state authority," and except as restricted by the provisos in question, the states are left as free to act in the premises, as in regard to the taxation of the lands within their limits.

The act of Congress does not require that shares in the National Banks *hall* be taxed, irrespective of the question whether the state has conformed its legislation to the requirements of the 41st Sec; it has only provided that within certain limits such taxation *m y* take place.

2. There is no conflict between the provisons of the 41st Section, and the rule of uniformity of taxation prescribed by the State Constitution.

The consequence of a want of conformity to the laws to the State laws to the 41st Section, would not justify the state in resorting to a method of taxation in violation of its own constitution.

The citizen of Wisconsin who invested his money in shares in National Banks has not thereby forfeited or surrendered his right to the protection of the constitutional rule of uniformity in the taxation of his shares. Such is not the effect of the Act of Congress. There is nothing in the act in conflict with or subversion of the uniform rule of taxation, prescribed by the state Constitution,—nor has Congress prescribed a mode of taxation of the shares in National banks which in any sense whatever conflicts or interferes with the application of the Constitutional rule of uniformity.

Since 1866 the state found no difficulty in bringing its legislation into entire harmony with the act of congress and in observing at the same time the constitutional rule of taxation. Laws of Wis. 1866, chapter 102.

As to the *novelty* of this kind of property brought into existence by the superior power of the general government, it is submitted that had the act of congress been silent on the subject, the power of the states to tax would have existed.

Shares in the old United States bank were held to be subject to state taxation. They were brought into existence by the same authority as shares in national banks.

Utica v. Churchill, 33 N. Y. 234.
Barlow v. Charleston, Nott & McCord 527.
State v. Collectors, 2 Bailey 654.

And if subject to state taxation it may be taxed as all other property is taxed, in the absence of any express or implied restriction by Congress. See *McCulloch v. Maryland*, 4, *Wheat* 436. Where the power of the state to tax attaches, all the state rules of taxation apply with it and as a part of it.

III.

As to the act of 1868, chapter 136, Laws of Wis. for that year, under which the taxes in question were reassessed, it is submitted that it is void for conflict with the provisions of the 41st sec. of the National Banking Act, June 3, 1864.

1. If we are correct in our claim that the state had no authority to impose these taxes under the law of 1865, for want of conformity of that act to the provisions of the 41st sec. of the National Banking Law, then the imposition of taxes on the bank share of the plaintiff in error *was forbidden and his share did not become the subject of state taxation*, until 1867 when Chapt. 102, Laws of 1866, became operative, which taxed the State and National Banks alike upon a valuation, and as other property in the state was taxed.

It is not therefore competent for the state by a retrospective enactment to assess or re-assess under any law which it might enact, taxes upon such share, for the years 1865 and 1866 during which it was protected by such prohibition from taxation.

This act of the legislature seeks neither to furnish a remedy for an existing right, nor to cure any irregularity in the proceedings to enforce such right.

It is an attempt to arbitrarily create a liability on the part of the plaintiff in error, and to subject his property to forced sale, to extinguish the liability thus attempted to be created. We do not think any court has ever held that a legislature possess such power.

It would be simply depriving the plaintiff in error of his property, not by the law of the land, but by arbitrary legislation, which can by no process of reasoning be brought within the definition of law.

The right of taxation exists only by virtue of some positive statute and the power inherent in the government to tax, lies dormant until a constitutional law has been passed, calling it into action.

Cooley on Const. Law 520.

The authority of the legislature to pass the act providing for the reassessment of these taxes was dependant upon the existence originally of an authority on the part of the state to levy and collect them; the authority of the legislature being confined to cases where there has been a failure to execute, or a *defective execution of an already existing power*.

Certainly no such power can be claimed on the part of the state in this instance, unless there was adequate legislation in force in 1865 and 1866, under which this share might have been lawfully taxed, because unless the state and congressional legislation were in harmony then the effect of the act of Congress was to *forbid* such taxation. It says in effect, to the state, if you frame your legislation so as to conform to the provisos contained in the 41st. Sec. of the National banking, act, then nothing therein shall be construed as preventing shares in National banks from being included in the valuation &c., and taxed; but if you do not so conform your legislation, your power af taxation as to these shares is denied.

The foundation for the distinction here made is that in the one case there is is an *entire failure of all authority or jurisdiction* and in the other a failure to *properly exercise* a jurisdiction or authority *already possessed.*

Denney v. Matoon, 2 Allen, 261.
Marsh v. Chestnut, 14, Ill., 223.
Billings v. Detlin, 15, Id., 218.
McDonald v. Carroll, 19, Id.,361.
Mayor, &c., v. Horn, 20 Md., 194.

Any other conclusion would render the prohibitions contained in the provisos to the 41st Section of the National banking act utterly nuga-

tory, and conformity to them on the part of the states in the exercise of the power of taxation a matter of form and not of substance.

The transaction in relation to the taxes of 1865 and 1866 are past and closed, and the prohibitions of the provisos of the 41st Section of the National banking act, secured the shares of shareholders against legislation such as this.

For these reasons, to-wit: 1. For holding that the state legislation in question was in conformity with the 41st Section of the act of congress of June 3, 1864, and that it authorized the taxation in question. 2. For holding that the construction and effect of the act of congress was to suspend and supersede the operation of the uniform rule of taxation prescribed by the constitution of Wisconsin, as to the taxation of shares in National banks. 3. For holding that the act of 1868, Ch. 136, Laws of Wisconsin for that year, was not in contravention of the said act of congress, and justified the reassessment and collection of the taxes in question; it is submitted that the judgment of the Supreme Court of Wisconsin should be reversed.

S. U. PINNEY,
Attorney for Plaintiff in Error.

Supreme Court of United States.

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Plaintiff in Error,
vs.
THE STATE OF WISCONSIN,
Defendant in Error.

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S. S. BARLOW,
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In Error to the Supreme Court of the State of Wisconsin.

STATEMENT OF CASES.

The constitution of the State of Wisconsin withholds from the legislature the power to create any banking corporation except by a law which shall have been submitted to a vote of the electors at a general election and approved by a majority of the votes cast upon the subject. Art. XI, Sections 4 and 5.

It has been held by the Supreme Court that a banking law so passed and approved cannot be changed except by an amendatory act approved by the people in the same manner. 17 Wis. Rep., p. 445.

In 1852 the legislature passed an act entitled "an act to authorize the business of banking," which was approved by a vote of the people. Laws of 1852, Chap. 479. Under this law were organized all the banks which have been created by the authority of the State.

There are only two provisions in this banking law to which attention need be called. The first is that the banks were to re-

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ceive their circulation from the bank comptroller, and before receiving it were obliged to assign to the state treasurer an equal amount of the public stock or bonds of the *United States* or of certain other stocks mentioned in the act. Sec. 5. The other provision we quote so far as it relates to the subject of taxation: "Every bank and banking association organized under the provisions of this act shall pay to the state treasurer on the first day of January, and July of each year, a semi-annual tax of three-fourths of one per centum on the amount of capital stock of such bank or banking association; the first payment of such tax to be computed at the rate of one and a half per centum per annum from the time of filing the certificate [of organization] required in section nineteen, to the first day of January or July then next succeeding. * * Said capital stock shall be exempt from all other taxes except on that portion of said capital stock which shall consist of and include the real property of such banks and banking associations; and the real property of all banks and banking associations shall be assessed and taxed in the city, ward, village or town where the same is located, for all state, county, town and corporation purposes, in the name of such bank or banking association: *Provided*, that the owner or holder of shares of stock in any bank or banking association shall not be taxed as an individual for such share or shares of stock." Sec. 16, chap. 479.

In May, 1865, the legislature passed an act entitled "an act to provide for taxing the shares of stock of national banking associations." *Laws of* 1865, *chap.* 400.

The 1st section of this act made it the duty of the assessor of every city or town in which a national bank was located, "to include in the valuation of the personal property of any person or corporation, whether residing or located in or out of such city, town or ward, the shares of such banking association owned by such banking association or corporation, at the *par* value of such shares."

The 3d section made it the duty of every such shareholder "to

pay to the State Treasurer, on or before the 31st day of December in each year, a tax for that year, of one and one-half per centum on the par value of such stock;" and if the tax on any such stock remained unpaid until the first day of February thereafter, required the State Treasurer to sell such stock for the payment thereof, after four weeks public notice.

The 5th section declared that such banking associations might pay such taxes on behalf of their stockholders, and should have a lien upon such stock for the amount so paid.

Section 7 is as follows: "Whenever the tax assessed upon other monied capital in the hands of individual citizens of the State shall be less than one and one-half per-centum, it shall be the duty of the State Treasurer to reduce correspondingly the tax upon the stock of the said banking associations, and to require payment only of such reduced tax."

Under this law the shareholders in the First National Bank of Madison, and in several other of the National Banks, paid taxes upon their shares for the year 1865, at the rate of one and one-half per centum upon the par value of the shares. The shareholders in a large majority of the National Banks refused to pay the taxes required by the law for the year 1865, and in the year 1866 no taxes whatever were paid to the State upon shares in the National Banks.

In May, 1867, N. B. Van Slyke, a shareholder in the First National Bank of Madison, and the holder, by assignment of the rights of his co-shareholders in the premises, brought an action against the State to recover back the taxes which he and they had paid for the year 1865. Judgment passed for the State upon demurrer to the complaint, and he brings that judgment here by a writ error.

In March, 1868, the legislature passed an act "to provide for the reassessment and collection of delinquent taxes of 1865 and 1866, on the shares of national banks."

The first section of this act made it the duty of the State Treasurer to transmit to the assessor of every city or town in

which a national bank was located, a statement showing the date of its organization, the amount of its capital stock, the name of its stockholders on the 5th day of June, 1865, and on the 5th day of June, 1866, and the number of shares then held by each, and stating whether the taxes due to the state for either or both said years remained unpaid.

The second section made it the duty of the assessor, in the valuation of the personal property for the year 1868, of every person, to include therein the shares in any national bank owned by such person at the time fixed by law for the assessment of personal property in each of the years for which taxes therein appeared by such statement to remain unpaid and "to assess such shares at their true cash value at such time, but such shares shall in no case be assessed at *more than their par value*."

The 5th section made the duty of the assessor to set down opposite the name of each owner of such shares for each of said years 1865 and 1866, the same rate of tax which was in such year levied upon other moneyed capital in the hands of individual citizens, and *no greater* rate, with a *proviso* that such rate should not in any case *exceed* one and one half per cent. upon the assessed value of such shares; and with a further proviso that if the organization of any such bank took place after the first day of January in either of said years, then the tax for said year should be reduced so as to bear such proportion to the rate above mentioned as the part of the unexpired year at the date of its organization, bore to the whole year.

The 13th section declared that the value of bank shares assessed under the act should not be included in the basis for apportionment of taxes.

The 14th section declared that any shareholder might pay to the State Treasurer the amount of tax required to be levied upon his share under said act, and in any action brought against the State to recover back the money, such payment should be deemed to have been compulsory, and that the tax should be refunded if the Supreme Court of the State or the Supreme Court

of the United States should determine that the State could not, under the laws hereinbefore referred to, lawfully impose or re-assess and collect the taxes in controversy.

The authority of the legislature to pass a law providing for a re-assessment of a tax for a given year where there has been a defect in the existing statute, or in the tax proceedings, has been frequently affirmed. *Opinion in Bagnall's case, folio* 24.

Under this act of 1868, the plaintiff Bagnall paid taxes on one share of stock in the First National Bank of Milwaukee, for the years 1865 and 1866, at the rate of one and a half per cent. on the par value of said shares, and brought his action against the State to recover back the money so paid. On demurrer to the complaint, judgment was rendered in favor of the defendant, and the plaintiff sued out a writ of error.

POINTS FOR DEFENDANT IN ERROR.

I.

Under the State Banking Law, the state banks were bound to pay a tax to the state of one and one half per cent. a year, upon the amount of their capital stock, without regard to the actual value of the stock, and without any deduction on the ground that their capital was invested in United States securities, Van Slyke vs. the State, 23 Wis., 655; Bagnall vs. the State, 25 Wis., 112.

II.

The tax imposed by the State banking law was not upon the capital, but upon the amount of the capital stock of the bank. The ital stock being only the aggregate of the shares, the tax was, in fact, upon each share or aliquot part into which the stock was divi ded. The fact that the law required the officers of the State banks to pay this tax, "does not prove that the tax is anything else than a tax on the shares. It has been the practice of many of the States for a long time to require of its corporations thus to pay the tax

levied on their shareholders." National Bank vs. Commonwealth, 9 Wall, 353. By the law of Kentucky, under which that case arose, a tax was levied "on bank stock, or stock in any moneyed corporation of loan or discount, of fifty cents on each share thereof, equal to one hundred dollars, or on each one hundred dollars therein." In Wisconsin, the tax was upon the aggregate or totality of the shares, and the tax appears to be upon the shares, in the latter case as much as in the former.

III.

The shares in the national banks being assessed, at not exceeding their par value, and the rate of tax being limited to one and a half per cent., and there being no deduction on account of the investment of the capital in United States securities, the tax upon the State banks was the exact equivalent of the tax on the shares in the national banks. This is sufficient under doctrine laid down in Van Allen vs. The Assessors, and Bradley vs. The People. 3 Wall, 573; 4 Wall, 459.

IV.

The state banking law was enacted by a vote of the people and could not be amended or changed by a mere act of the legislature. Reedsburg Bank vs. Hastings, 12 Wis., 47; Van Steenwyck vs. Sackett, 17 Wis., 445.

V.

If the tax imposed under the banking law upon the amount of capital stock, is not a tax upon the shares *eo nomine* it was as nearly so as the state had *capacity* to make it, at the time the law was passed taxing the shares in national banks; and that law should be sustained upon that ground. Lionberger vs. Rouse, 9 Wall., 468.

VI.

The law of 1868, under which the Bagnall case arises, required not only that the shares in the national banks, should not be assessed at over their par value, but that the rate of tax levied should not be greater than the rate levied upon other moneyed capital in the hands of individual citizens, and that it should not in any locality exceed the rate of one and a half per cent., which was imposed upon the capital stock of the State banks. Mr. Bagnall does not pretend that his share was assessed at more than its actual or its par value, or that the rate of tax imposed upon it was higher than the rate imposed upon other moneyed capital.

VII.

He alleges that the tax of one and a half per cent. levied upon his share was greater than the rate of *State* tax levied upon moneyed capital. The tax upon the State banks, as well as upon the shares of the national banks, was required to be paid into the State Treasury and is called a State tax; but clearly the limitation in the act of Congress is only as to the rate of tax which the State may impose, and not as to the use to which the tax may be applied. He complains also that the law of 1868 forbids the equalization of the assessments of shares in National Banks. In this he errs. See opinion in his case, fol. 23. He complains also that the law excluded bank shares and the capital stock of banks from being taken into account in the apportionment of taxes. The argument of his counsel shows that the rate of tax required to raise a given sum in any locality where there are banks would be increased by excluding the bank capital from the basis on which the tax is apportioned, but no argument can show that a tax of one and a half per cent. on bank shares is higher than the same rate per cent. imposed upon other capital where each species of property is assessed at its actual value.

VIII.

It is argued that the tax imposed upon state banks is a *franchise* tax, and that the tax imposed upon the shares of national banks is a *property* tax; but the latter tax like the former, is but a tax upon the new privileges conferred upon the banks by their respective charters. Van Allen vs. The Assessors, 3 Wall 583.

IX.

The tax upon the State banks was more onerous than that upon shares in National banks, because the State banks were bound also to pay taxes upon their "accumulated profits," and if a portion of their capital was lost, could only be relieved by applying to the legislature to reduce the nominal to the actual amount of capital. State Bank vs. City of Milwaukee, 18 Wis., 281.

X.

If the decision of this court in the Bagnall case shall be in favor of the state it will be decisive of Van Slyke's case. It is doubtful whether Van Slyke's case presents any question for review here. If the Supreme Court erred in holding, that the taxation of our state banks justified the taxation of shares in the national banks, although the tax was not upon the shares *eo-nomine* in the state banks, they had a right to determine whether the state could not in equity and good conscience retain the money which the plaintiff had paid into her treasury.

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